

Teleworking for cross-border commuters - New social security agreement facilitates teleworking between Switzerland and certain EU/EFTA countries

Switzerland and certain EU and EFTA countries have signed a new framework agreement on social security coordination rules to facilitate cross-border teleworking. This framework agreement will be applied by Switzerland from 1 July 2023, and allows cross-border employees to telework up to 49.9% of their working time in their country of residence, while remaining subject, for social security purposes, to the legislation of the State in which the employer has his registered office.

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A brief review of the situation up to 30 June 2023

Under the Agreement on the Free Movement of Persons (ALCP) or the EFTA Convention, employees who are nationals of certain States are in principle subject to the social security system of the country where they work. Thus, cross-border commuters working in Switzerland are usually

obliged to contribute to the Swiss social security system.

However, when the employee also carries out part of his activity in his State of residence, the affiliation changes and is made to the social security system of the State of residence if the activity in this State is equal to or greater than 25%.

This rule also applies to work carried out at home by cross-border commuters.

However, since the restrictions imposed by the SARS-CoV-2 pandemic, these rules have been given a "flexible interpretation" in the case of telework in the country of residence, as set out in the *Guidance Note on telework* issued by the Administrative Commission for the Coordination of Social Security Systems (ACCSSS). On the basis of this interpretation, Swiss compensation funds could consider that an employee teleworking from his or her country of residence (even at 100%) remained affiliated with Swiss social security insurances (*i.e.* in the State in which the employer has his registered office). In principle, an A1 certificate was not required in such situations.

However, this derogation from the general rules in favor of teleworking for cross-border commuters was only valid until 30 June 2023.

New framework agreement applicable from 1 July 2023

In order to facilitate the practice of teleworking after 30 June 2023, a framework agreement has been drafted by an *ad hoc* group set up by the European Commission and the ACCSSS. This framework agreement, the legal nature of which is not clearly defined, does not however modify the general rules on social security deriving from the ALCP and the EFTA Convention. It is binding only on the signatory States, *i.e.*, as of 3 July 2023: Austria, Belgium, Croatia, Czech Republic, Finland, France, Germany, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Spain, Sweden and Switzerland. Other states have declared their intention to apply the framework agreement (namely Estonia, Hungary, Ireland, Lithuania), but have not yet signed it. The United Kingdom has indicated that it will not sign the framework agreement.

Under the framework agreement, several conditions must be met for teleworking not to change the applicable legislation:

a) Residence and work in two signatory States

First of all, derogations from the general rules on social security apply only between signatory States. This means that the employee must reside in a signatory State and work for an employer with a registered office in another signatory State.

b) 50% teleworking limit

Secondly, the derogations only apply to employees who telework in their country of residence up to 50% of the time (*i.e.* a maximum of 49.9% of total working time).

This limit is calculated per 12-month period. It is therefore possible to exceed the 49.9% limit during certain weeks, as long as this limit is respected over 12 months.

c) Limits on the type of telework

Another important condition is that the framework agreement only applies in situations where the employee is linked to the employer by an electronic connection. Purely manual work (*e.g.* manual

work on timepieces) does not qualify as telework as defined by the framework agreement.

This electronic connection must exist and be used regularly. However, it is not required that 100% of the work be done electronically. For example, the reading of printed documents or the marking of students' papers by a teacher also qualifies as telework as defined by the framework agreement.

d) Inapplicability of **the agreement to certain situations**

In addition, the framework agreement does not apply to the following situations:

- People who habitually pursue an activity other than cross-border telework in the State of residence (e.g. visiting clients, self-employed sideline activity);
- People who (also) habitually pursue an activity in a State which is not a signatory to the framework agreement;
- People who, in addition to working for their Swiss employer, also work for another employer with a registered office in the EU or EFTA;
- Self-employed workers.

f) A1 certificate required

Finally, application of the framework agreement is not automatic. To benefit from it, employers based in Switzerland must request an A1 certificate from their AVS compensation fund, via the *Applicable Legislation Portal Switzerland* (ALPS) platform.

This platform is currently being updated. The Federal Social Insurance Office had previously announced that this platform might not be available from 1 July 2023, when the framework agreement comes into force in Switzerland. However, under the terms of the framework agreement, A1 certificate may be requested retroactively to 1 July 2023 if the request is submitted before the end of June 2024.

The A1 certificate thus obtained will be valid for a maximum of three years, and will be renewable.

Other relevant information

As indicated, the framework agreement applies only between signatory States. In cross-border telework situations where a non-signatory State to the framework agreement is involved, the rules and procedures applicable before the pandemic will once again be applied from 1 July 2023, unless a specific agreement has been reached.

In particular, it will be necessary to check the applicability of Regulation (EC) no. 883/2004 or any other social insurance agreement.

If Regulation (EC) no. 883/2004 is applicable, the obligation to pay social security contributions will change for the country of residence if the activity in this country (including teleworking) exceeds 25%.

Furthermore, the framework agreement does not regulate the tax aspects of cross-border teleworking. These must therefore be analyzed separately. Indeed, the application of tax rules may, in certain cases, lead to the application of a teleworking threshold lower than 49.9%.



In addition, as in any cross-border teleworking situation, an analysis of the applicable law, the potential creation of a judicial forum, immigration law issues, the problems of permanent establishment in tax law and establishment in data protection law must be carried out before any cross-border teleworking is set up.

Please do not hesitate to contact us in case of any questions.

Legal Note: The information contained in this Smart Insight newsletter is of general nature and does not constitute legal advice.

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